Supreme Court, U.S.
FILED
SEP 15 1993
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No. 92-1854

In The

# Supreme Court of the United States

October Term, 1992

KATHLEEN POOLE, as Administratrix of the Estate of DAVID POOLE,

*Petitioner,*

*vs.*

CONSOLIDATED RAIL CORPORATION,

*Respondent.*

*On Petition for Writ of Certiorari to the New York State Court of Appeals*

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL BRIEF FOR PETITIONER

This supplemental brief is submitted pursuant to Supreme Court Rule 15.7, to inform the Court that since the time petitioner's reply brief was submitted, petitioner's counsel has learned that a major portion of the decision at the New York State Court of Appeals in the instant case (4a-18a[1]) was recently overruled by new legislation. On July 28, 1993, CPLR 3101(i) was signed into law by New York State Governor Mario Cuomo (1sa[2]).

1. "a" signifies appendix to original petition.

2. "sa" signifies appendix to supplemental brief.

CPLR 3101(i) provides that:

> In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (A) of this section. There shall be disclosure of all portions of such materials, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under Section Eighty-seven of the Public Officers Law.

New CPLR 3101(i), which took effect on September 1, 1993 (1sa), abrogated that part of the Court of Appeals decision which stated that only those surveillance tapes which a defendant intends to use at trial are discoverable (15a). The Legislature's swift and thorough repudiation of the Court of Appeals' limitation on discovery of surveillance materials contradicts the assertion that former Chief Judge Wachtler's opinion was a "careful compromise" to even-handedly "reconcile defendants' interest in keeping matters prepared for litigation private with plaintiff's need to authenticate easily distorted visual evidence" (15a). Rather, the Legislature's enactment of CPLR 3101(i) supports petitioner's contention that the unique status accorded surveillance materials in former Chief Judge Wachtler's opinion is best explained by his interest and/or bias concerning the subject of surveillance.

## CONCLUSION

Petitioner respectfully prays that this Court grant her petition for a writ of certiorari to the end that this Court decide on the merits that petitioner's decedent, David Poole, was deprived of due process under the Fourteenth Amendment. The orders of the New York State Court of Appeals should be vacated, and the case should be reheard by the Court of Appeals.

Dated: September 15,1993

Respectfully submitted,

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## APPENDIX A — TEXT OF CPLR 3101(i) SIGNED INTO LAW ON JULY 28, 1993

LAWS OF NEW YORK, 1993
CHAPTER 574

AN ACT to amend the civil practice law and rules, in relation to disclosure of films, photographs, video tapes and audio tapes in certain cases,

Became a law July 28, 1993, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 3101 of the civil practice law and rules is amended by adding a new subdivision (i) to read as follows:

> IN ADDITION TO ANY OTHER MATTER WHICH MAY BE SUBJECT TO DISCLOSURE, THERE SHALL BE FULL DISCLOSURE OF ANY FILMS, PHOTOGRAPHS, VIDEO TAPES OR AUDIO TAPES, INCLUDING TRANSCRIPTS OR MEMORANDA THEREOF, INVOLVING A PERSON REFERRED TO IN PARAGRAPH ONE OF SUBDIVISION (A) OF THIS SECTION. THERE SHALL BE DISCLOSURE OF ALL PORTIONS OF SUCH MATERIALS, INCLUDING OUT-TAKES, RATHER THAN

*Appendix A*

ONLY THOSE PORTIONS A PARTY INTENDS TO USE. THE PROVISIONS OF THIS SUBDIVISION SHALL NOT APPLY TO MATERIALS COMPILED FOR LAW ENFORCEMENT PURPOSES WHICH ARE EXEMPT FROM DISCLOSURE UNDER SECTION EIGHTY-SEVEN OF THE PUBLIC OFFICERS LAW.

Section 2. This act shall take effect on the first day of September next succeeding the date on which it shall have become law.

The Legislature of the STATE OF NEW YORK SS: (JURAT PLACEHOLDER)

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

RALPH J. MARINO
TEMPORARY PRESIDENT OF THE SENATE

SAUL WEPRIN
SPEAKER OF THE ASSEMBLY